

**DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS**

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

BARRY ZUCKERMAN PROPERTY and
BARRY ZUCKERMAN
Respondents

Case Nos.: I-00-10647
I-00-10665

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

BARRY ZUCKERMAN PROPERTY and
BARRY ZUCKERMAN
Respondents

Case Nos.: I-00-11172
I-00-10622

(Consolidated)

FINAL ORDER

I. Introduction

These cases arise under the Civil Infractions Act of 1985 (D.C. Official Code §§ 2-1801.01 – 2-1802.05) and Title 21 Chapter 5 of the District of Columbia Municipal Regulations (“DCMR”). Respondents Barry Zuckerman Property and Barry Zuckerman were charged with violations of various regulations pertaining to erosion and sedimentation control measures at two construction sites. Respondents filed untimely pleas of Admit with payment of the fines. They now request the suspension or reduction of the statutory penalties imposed for their failure to timely file their pleas. The ground for the relief requested is that the original Notices of

Infraction were allegedly sent to Respondents' former address and whoever received them did not forward them to Respondents. The Government has not replied to Respondents' request within the time allowed. These cases are now ripe for decision

II. Summary of the Evidence

A. Case Nos.: I-00-11172 and I-00-10622

By Notice of Infraction (00-11172) served on April 3, 2001, Respondents were charged with violations of five regulations. The Notice of Infraction alleged that the violations occurred on March 22, 2001, at a construction site at 5037 Eskridge Terrace, N.W., and fines in the total amount of \$500 were sought.¹ The Notice was sent to Respondents by certified mail at "2 Wisconsin Avenue Circle, Chevy Chase, MD 20815". Respondents did not file an answer within the required time period.¹ Accordingly, an order was issued by this administrative court finding Respondents in default and subject to statutory penalties in the total amount of \$500², in addition to the \$500 in fines, and directing the Government to serve a second Notice of Infraction. The order, with a copy of the Notice of Infraction attached, was served by mail on May 4, 2001, sent to Respondents at "2 Wisconsin Avenue, Chevy Chase, MD 20815". The Government then

¹ A \$100 fine is specified for each of the violations charged: 21 DCMR 506.2, 16DCMR 3234.2(c); 21 DCMR 538.1(k), 16 DCMR 3234.2(w); 21 DCMR 539.4, 16 DCMR 3224.2(y); 21 DCMR 539.5, 16 DCMR 3234.2(z); and 21 DCMR 539.6, 16 DCMR 3234.2 (aa).

¹ When service is by mail, an answer must be filed within twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Official Code §§ 21802.02(e) and 21802.05).

² D.C. Official Code § 2-1801.04(a)(2)(A) provides that a respondent who fails to answer a notice of infraction timely may be assessed a penalty equal to the amount of the civil fine for each infraction.

served a second Notice of Infraction (00-10622) on May 10, 2001. This Notice was also served by certified mail sent to Respondents at “2 Wisconsin Circle, Chevy Chase, MD 20815”.

Since Respondents did not file an answer to the second Notice of Infraction, this administrative court entered a Final Notice Of Default, finding Respondents in default and subject to statutory penalties in the total amount of \$1,000³, in addition to the \$500 in fines, and scheduling an *ex parte* proof hearing. The Final Notice, with copies of the first and second Notices of Infraction attached, was served on July 18, 2001, by mail sent to Respondents at “2 Wisconsin Avenue, Chevy Chase, MD 20815”.

Pursuant to the Final Notice, the Government then filed its list of documents to be introduced and the witnesses to be called at the scheduled *ex parte* proof hearing. A copy of this was served on Respondents on July 30, 2001, by certified mail sent to “2 Wisconsin Circle, Chevy Chase, MD 20815”.

On August 8, 2001, Respondents filed an untimely plea of Admit and a payment of the fines in the amount of \$500. Respondents payment was by check No, 2663, dated August 8, 2001. The drawer of the check is identified as “Barry Zuckerman Properties, Inc., 2 Wisconsin Circle, Suite 560, Chevy Chase, MD 20815”.

By an order of this administrative court served on August 10, 2001, Respondents were notified that they still remained liable for the statutory fines assessed, in the amount of \$1,000,

³ D.C. Official Code § 2-1801.04(a)(2)(B) provides that a respondent who fails to answer a second notice of infraction timely may be assessed a penalty equal to twice the amount of the civil fine for each infraction.

and that they could seek reconsideration of the order within fifteen days. The order was served by mail sent to Respondents at “2 Wisconsin Avenue, Chevy Chase, MD 20815”.

B. Case Nos.: I-00-10647 and I-00-10665

By Notice of Infraction (00-10647) served on June 21, 2001, Respondents were charged with violations of eight regulations. The Notice of Infraction alleged that the violations occurred at a construction site at 4933 MacArthur Blvd., N.W., on June 8, 2001, and fines in the total amount of \$800 were sought.⁵ The Notice was served by certified mail sent to Respondents at “2 Wisconsin Circle, Chevy Chase, MD 20815.”

Respondents did not file an answer within the required period.⁶ Accordingly, an order was issued by this administrative court finding Respondents in default and subject to statutory penalties in the total amount of \$800⁷, in addition to the \$800 in fines, and directing the Government to serve a second Notice of Infraction. The order, with a copy of the Notice of Infraction attached, was served on July 23, 2001, by mail sent to Respondents at “2 Wisconsin Circle, Chevy Chase, MD 20815”. The Government then served a second Notice of Infraction (00-10665) on July 30, 2001, by certified mail also sent to Respondents at “2 Wisconsin Circle, Chevy Chase, MD 20815”.

⁵ A \$100 fine is specified for each violation: 21 DCMR 506.2, 16 DCMR 3234.2(c); 21 DCMR 538.1(h), 16 DCMR 3234.2(t); 21 DCMR 538.1(k), 16 DCMR 3234.2(w); 21 DCMR 539.4, 16 DCMR 3234.4(y); 21 DCMR 539.5, 16 DCMR 3234.2(z); 21 DCMR 539.6, 16 DCMR 3234.2(aa); 21 DCMR 539.9, 16 DCMR 3234.2(bb); and 21 DCMR 541.2, 16 DCMR 3234.2(cc).

⁶ See note 1 *supra*.

⁷ See note 2 *supra*.

On July 30, 2001, Respondents filed an untimely plea of Admit to the Notices of Infraction 00-10647 and 00-665, and they also filed an untimely plea of Admit in connection with two other Notices of Infraction.⁸ Accompanying the pleas was check No. 2637, Dated July 30, 2001, in the amount of \$3,000. The drawer of the check was identified as “Barry Zuckerman Properties, Inc., 2 Wisconsin Circle, Suite 560, Chevy Chase, MD 20815.”

By order of this administrative court, \$2,200 of Respondents’ payment was applied towards the fines and statutory penalties assessed against them in connection with the two other Notices of Infraction⁹, and the balance of \$800 was applied toward the fines assessed in Notice of Infraction. 00-10647. The order also notified Respondents that the statutory penalties with respect to Notice of Infraction 00-10647 remained in effect, and that Respondents could seek reconsideration of the order. This order was served on August 8, 2001, by mail sent to Respondents at “2 Wisconsin Circle Ste. 560, Chevy Chase, MD 20815.”

C. Suspension or Reduction of the Statutory Penalties

On August 22, 2001, Respondents filed a request for suspension or reduction of the penalties assessed in these cases. Respondents represent that the original Notices of Infraction

⁸ Notice of Infraction 00-10638 charged Respondents with six violations of the regulations pertaining to soil erosion and sedimentation control measures at 4933 MacArthur Blvd., N.W. The Notice alleged that the violations occurred on May 25, 2001, and fines in the total amount of \$1,100 were sought. The Notice was served on May 31, 2001, by certified mail sent to Respondents at “2 Chevy Chase, MD 20815”. Thereafter, an order of default was entered by this administrative court for Respondents’ failure to file a timely answer. In accordance with the order of default, Respondents were subject to statutory fines, and the Government was directed to serve a second Notice of Infraction. The order, with a copy of the Notice of Infraction attached, was served on July 11, 2001, by mail sent to Respondents at “2 Wisconsin Circle, Chevy Chase, MD 20815”. The Government served a second Notice of Infraction (00-10663) on July 20, 2001, sent to Respondents by certified mail at “2 Wisconsin Circle, Chevy Chase, MD 20815.”

⁹ See note 8 *supra*.

were sent to their prior address, that “someone” signed for the Notices, but allegedly they were not forwarded to Respondents. The request was dated August 21, 2001, and the address on the letterhead is: “Barry Zuckerman Properties, Inc. 4938 Hampden Lane – 342, Bethesda, MD 20814.”

III. Findings of Fact

The original Notice of Infraction in each case was served by certified mail sent to Respondents at their last known address. Respondents admit that these Notices were in fact delivered, but they assert that they were sent to their former address and that the person who accepted delivery did not forward them. Respondents do not identify the person who accepted delivery of the certified mail. At the same time, they do not contend that this person was unauthorized to accept delivery of mail on their behalf, nor do they contend that they are not responsible for the actions of this person.

In addition to the original Notices of Infraction in each of these cases, several orders of this administrative court were also sent to Respondents at the same address. Attached to the orders served on May 4 and July 18, 2001, were copies of the Notices of Infraction 00-11172 and 00-10622. Attached to the order served on July 23, 2001, was a copy of the Notice of Infraction 00-10647. There is no evidence in the record that any of these orders were returned as undeliverable by the United States Postal Service; and Respondents have not alleged that these orders were not received by them in due course. Indeed, even if Respondents did not receive the

original Notices of Infraction, they must have received these orders, since they filed pleas and made payments of the fines in each case.

After Respondents made payment of the fines in each case, the orders of this administrative court (notifying them that the penalties remained in effect, but allowing them to file for reconsideration) were served on Respondents on August 7 and August 10, 2001 at the same address to which all other orders and Notices of Infraction in these cases were sent, during the period April through August, 2001.¹⁰ (This was also the address that appeared on Respondents' checks dated July 30 and August 8, 2001, in payment of the fines.) Respondents must have received these orders allegedly sent to their former address, since they filed a timely request for the suspension or reduction of the penalties on August 22, 2001.

IV. Conclusions of Law

There was adequate service on Respondents of the Notices of Infraction and the orders of this administrative court, as required by the Due Process Clause and the Civil Infractions Act. D.C. Official Code §§ 2-1802.01 and 2-1802.05; *Dusenberry v. United States*, 534 U.S. 161 (2002); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800 (1983); *McCaskill v. District of Columbia Dep't of Employment Services*, 572 A.2d 443, 445 (D.C. 1990); *Carroll v. District of Columbia Dep't of Employment Services*, 487 A.2d 622, 624 (D.C. 1985).

¹⁰ See also note 8 *supra*. In May and July 2001, the Notices of Infraction in 00-10638 and 00-10663 were served on Respondents by certified mail, and orders of this administrative court were served by regular mail, at this same address. The fines and statutory penalties were paid; and Respondents did not claim that the Notices or orders in those cases were not received by them.

Under the Civil Infractions Act, if a respondent fails without good cause to answer a Notice of Infraction within the allotted time period (fifteen days from service plus five days for mailing, pursuant to D.C. Official Code §§ 2-1801.02(e) and 2-1801.05) the statutory penalty for each violation must be assessed.¹¹ Respondents have not demonstrated good cause for their failure to timely file their pleas in these cases.

V. Order

Based upon the foregoing findings of fact and conclusions of law, it is this ____ day of _____, 2002:

ORDERED, that Respondents Barry Zuckerman Property and Barry Zuckerman, jointly and severally, shall pay a total of **ONE THOUSAND EIGHT HUNDRED DOLLARS (\$1,800)** in accordance with the attached instructions, within twenty (20) calendar days of the date of mailing of this order (fifteen (15) calendar days plus five (5) days for service by mail, pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondents fail to pay the above amount within twenty (20) calendar days of the date of mailing of this order, by law, interest will accrue on the unpaid amount at the rate of 1 ½% per month, or portion thereof, beginning with the date of this order. D.C. Official Code § 2-1803(i)(1); and it is further

¹¹ See notes 3 and 4 *supra*; D.C. Official Code § 2-1802.02(f).

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits, pursuant to D.C. Official Code § 2-1802.03 (f), the placement of a lien on real or personal owned by Respondents, pursuant to D.C. Official Code § 2-1802.03(i), and the sealing of Respondents' business premises or work sites, pursuant to D.C. Official Code § 2 -1801.03(b)(7).

/s/ **05/15/02**

Robert E. Sharkey
Administrative Judge